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In the Supreme Court of the United States

OCTOBER TERM, 1987

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

FRED KYLE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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BEST AVAILA

QUESTION PRESENTED

Whether the court of appeals erred in construing the requirement of Section 402(f)(2) of the Black Lung Benefits Act, 30 U.S.C. 902(f)(2), that the "criteria" applied to certain claims adjudicated by the Secretary of Labor "not be more restrictive" than criteria set forth in rules applied by the Secretary of Health, Education, and Welfare (HEW) to claims filed during an earlier period, and in thereby ruling that the Department of Labor must not only apply *medical* criteria no more restrictive than those applied by HEW, but must also apply the evidentiary rules and adjudicatory standards applied by HEW.

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PARTIES TO THE PROCEEDINGS

In addition to the named parties, the National Council on Compensation Insurance intervened in the court of appeals.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provision involved	2
Statement	2
1. Statutory and regulatory framework	2
2. Proceedings below	7
Reasons for granting the petition	8
Conclusion	10
Appendix A	1a
Appendix B	10a
Appendix C	15a
Appendix D	21a

TABLE OF AUTHORITIES

Cases:

Broyles v. *Director, Office of Workers' Compensation Programs*, 824 F.2d 327 (4th Cir. 1987)	8, 9, 10
Coughlan v. *Director, Office of Workers' Compensation Programs*, 757 F.2d 966 (8th Cir. 1985)	8, 9
Halon v. *Director, Office of Workers' Compensation Programs*, 713 F.2d 21 (3d Cir. 1983)	8, 9
Mullins Coal Co. v. *Director, Office of Workers' Compensation Programs*, No. 86-327 (Dec. 14, 1987)	3
Prater v. *Hite Preparation Co.*, 829 F.2d 1363 (6th Cir. 1987)	9
Ramey v. *Kentland Elkhorn Coal Corp.*, 755 F.2d 485 (6th Cir. 1985)	9
Strike v. *Director, Office of Workers' Compensation Programs*, 817 F.2d 395 (7th Cir. 1987)	9

Statutes and regulations:

Black Lung Benefits Act, 30 U.S.C. (& Supp. III) 901 *et seq.*	2
§ 401(a), 30 U.S.C. 901(a)	3
§ 402(b), 30 U.S.C. 902(b)	3
§ 402(f), 30 U.S.C. (1976 ed.) 902(f)	4
§ 402(f), 30 U.S.C. 902(f)	2

Statutes and regulations—Continued: Page

§ 402(f)(1), 30 U.S.C. 902(f)(1) 2
§ 402(f)(1)(A), 30 U.S.C. 902(f)(1)(A) 3
§ 402(f)(1)(D), 30 U.S.C. 902(f)(1)(D) 6
§ 402(f)(2), 30 U.S.C. 902(f)(2) 2, 6, 8
§ 411(c)(3), 30 U.S.C. 921(c)(3) 4
§ 412(a), 30 U.S.C. 922(a) 3
§ 414, 30 U.S.C. 924 3
§ 415, 30 U.S.C. 925 3
§ 422, 30 U.S.C. (& Supp III) 932 3
§ 422(b), 30 U.S.C. 932(b) 3
§ 422(c), 30 U.S.C. 932(c) 3
§ 422(j), 30 U.S.C. 932(j) 3
§ 424, 30 U.S.C. 934 3
§ 435, 30 U.S.C. 945 6

Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 2(c), 92 Stat. 96 6

26 U.S.C. 4121(a) 3

26 U.S.C. 9501 3

20 C.F.R.:
Pt. 410, Subpt. D:
App. 4
Section 410.412 4
Section 410.416 5
Section 410.418 4
Section 410.424 4
Section 410.426(a) 4
Section 410.426(b) 4
Section 410.426(c) 4
Section 410.426(d) 4
Section 410.456 5
Section 410.490(a) 4
Section 410.490(b)(1)(i) 5
Section 410.490(b)(1)(ii) 4
Section 410.490(b)(2) 5
Section 410.490(b)(3) 4, 5
Section 410.490(c) 5
Pt. 718 6
Section 718.1(b) 7

Regulations – Continued: Page

Pt. 727:

Section 727.202 3
Section 727.203 6
Section 727.203(a)(1) 7
Sections 727.203(a)(3)-(5) 6
Section 727.203(b)(1) 7
Section 727.203(b)(2) 7
Section 727.203(b)(3) 7
Section 727.203(b)(4) 7

Miscellaneous:

Lopatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W. Va. L. Rev. 677 (1983) 3

In the Supreme Court of the United States

OCTOBER TERM, 1987

No.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

FRED KYLE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the Director of the Office of Workers' Compensation Programs, United States Department of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-9a) is reported at 819 F.2d 139. The decisions of the Benefits Review Board (App., *infra*, 10a-14a) and the administrative law judge (App., *infra*, 15a-20a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1987. The rehearing petitions were denied on September 22, 1987 (App., *infra*, 21a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. 902(f), provides, in pertinent part:

> (1) The term "total disability" has the meaning given it by regulations of the Secretary of Health and Human Services for claims under part B of this subchapter, and by regulations of the Secretary of Labor for claims under part C of this subchapter, subject to the relevant provisions of subsections (b) and (d) of section 923 of this title, except that –
>
> * * * * *
>
> (2) Criteria applied by the Secretary of Labor in the case of –
>
> (A) any claim which is subject to review by the Secretary of Health and Human Services, or subject to a determination by the Secretary of Labor, under section 945(a) of this title;
>
> (B) any claim which is subject to review by the Secretary of Labor under section 945(b) of this title; and
>
> (C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;
>
> shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

STATEMENT

1. *Statutory and regulatory framework.* The Black Lung Benefits Act, 30 U.S.C. (& Supp. III) 901 *et seq.*, provides benefits to coal miners (and eligible survivors)

who suffer from pneumoconiosis[1] that arose out of coal mine employment, causing total disability or death. 30 U.S.C. 901(a), 922(a), 932(c); *Mullins Coal Co.* v. *Director, Office of Workers' Compensation Programs,* No. 86-327 (Dec. 14, 1987), slip op. 5. Claims for benefits are adjudicated under two programs, depending on the date the claim was filed. Claims filed before July 1, 1973, under "Part B" of the Act, were considered by the Department of Health, Education, and Welfare (HEW), and benefits were paid by the federal government. 30 U.S.C. 922(a), 924. Claims filed after that date, and adjudicated under "Part C" of the Act, are considered by the Department of Labor. 30 U.S.C. (& Supp. III) 925, 932. Individual coal mine operators bear primary responsibility for paying Part C benefits (30 U.S.C. 932(b)), although in certain cases Part C benefits are paid from the Black Lung Disability Trust Fund, which is financed by the coal mining industry and administered by the Director of the Office of Worker's Compensation Programs. See 30 U.S.C. 932(j), 934; 26 U.S.C. 4121(a), 9501.

a. A miner is totally disabled under the Act when he is unable to perform work comparable to that he did as a coal miner. 30 U.S.C. 902(f)(1)(A). Prior to the 1977 amendments, the Black Lung Benefits Act authorized HEW to establish the regulatory standards for determining when a coal miner's pneumoconiosis would be deemed

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[1] Pneumoconiosis is a lung disease caused by exposure to various types of dust, such as coal dust and asbestos. Lopatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W. Va. L. Rev. 677, 679 & n.13 (1983). When caused by coal dust, it is known as black lung disease. The statute (30 U.S.C. 902(b)) and the regulations (20 C.F.R. 727.202) include in the definition of "pneumoconiosis" not only the description of the disease but also a requirement that it be caused by coal mine employment. For clarity, we will use "pneumoconiosis"to refer solely to the disease, treating the question of causation as distinct.

to be totally disabling. See 30 U.S.C. (1976 ed.) 902(f). In 1972, HEW promulgated two sets of regulations. It promulgated permanent regulations that set certain medical standards for determining when a miner's respiratory impairment is considered totally disabling. Under HEW's permanent regulations, to establish total disability a miner had to show through ventilatory studies (also known as pulmonary function tests) that the volume of air his lungs could expel was less than certain values (20 C.F.R. 410.426(b)), or show an impairment of the blood's ability to carry oxygen or certain heart abnormalities (20 C.F.R. 410.424 & Subpt. D App.).[2]

In 1972, HEW also promulgated a special, interim regulation applicable only to Part B claims, *i.e.*, those filed by miners on or before June 30, 1973, or by survivors of miners who died before January 1, 1974. The interim regulation was HEW's response to congressional concern about an existing backlog of claims and the unavailability of medical testing facilities to evaluate disability due to pneumoconiosis. 20 C.F.R. 410.490(a). HEW's interim regulation provided an "interim presumption" of total disability for Part B claimants who showed a respiratory impairment, measured by ventilatory studies, that is substantially less severe than is required under HEW's permanent regulations. Compare 20 C.F.R. 410.490(b)(1)(ii) with 410.426(b). This rebuttable presumption was only available to miners who had worked at least ten years in coal mines. 20 C.F.R. 410.490(b)(1)(ii) and (b)(3)).[3]

---

[2] HEW's permanent regulations also incorporated the Act's requirement that a claimant would be considered totally disabled if he could no longer perform the type of work he did as a coal miner (20 C.F.R. 410.412, 410.426(a), (c) and (d)), as well as a statutory irrebuttable presumption of total disability (30 U.S.C. 921(c)(3)) where X-ray evidence showed severe damage to the lung (20 C.F.R. 410.418).

[3] HEW's interim regulation is unclear, in one part requiring 15 years of coal mine employment (20 C.F.R. 410.490(b)(1)(ii)), but later

HEW's interim regulation also provided a rebuttable presumption that a claimant was totally disabled if X-ray, biopsy, or autopsy evidence established the existence of pneumoconiosis and the impairment was caused by coal mine employment. 20 C.F.R. 410.490(b)(1)(i) and (b)(2). Causation could be proved under the regulation in two ways. First, if a miner worked for ten years in a coal mine his pneumoconiosis was presumed to arise from his coal mine employment. Second, in any other case the claimant "must submit the evidence necessary to establish that the pneumoconiosis arose out of employment in the Nation's coal mines." 20 C.F.R. 410.416, 410.456.[4] As a result, a miner who worked for less than ten years in a coal mine could establish a presumption of total disability under HEW's interim regulation by showing the existence of pneumoconiosis by means of an X-ray and presenting evidence supporting the claim that coal mine work caused the pneumoconiosis.[5]

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apparently requiring only ten years of coal mine employment (20 C.F.R. 410.490(b)(3)), to establish the interim presumption of total disability based on ventilatory studies. Courts have not resolved the ambiguity.

[4] While the regulation did not specifically address how a miner with less then ten years of work in coal mines could prove that his pneumoconiosis arose from coal mine employment, a claimant may establish causation by proving that he worked in coal mines and by showing that his pneumoconiosis was unlikely to have been caused by exposure to other sorts of lung irritants.

[5] HEW's interim presumption of total disability—whether invoked through X-ray, autopsy, or biopsy evidence, or through ventilatory studies—could be rebutted by "evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work" or by other evidence, "including physical performance tests * * * establish[ing] that the individual is able to do his usual coal mine work or comparable and gainful work." 20 C.F.R. 410.490(c).

b. Congress amended the Act in 1977, giving the Secretary of Labor the authority to issue regulations defining "total disability" and to "establish criteria for appropriate medical tests * * * which accurately reflect total disability in coal miners * * *." Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 2(c), 92 Stat. 96; 30 U.S.C. 902(f)(1)(D). Congress also directed the Secretary to reopen claims that had been denied prior to the effective date of the 1977 amendments. 30 U.S.C. 945. Congress provided in Section 402(f)(2) that, in adjudicating the total disability of those claimants, along with any other claimants who filed claims before the Secretary's final regulations were promulgated,[6] the "[c]riteria applied by the Secretary of Labor * * * shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973," *i.e.*, to a claim adjudicated under HEW's interim Part B regulations. 30 U.S.C. 902(f)(2).

The Secretary promulgated an interim regulation in 1978 (20 C.F.R. 727.203) that provides a presumption of total disability that is similar but not identical to HEW's interim regulation. The Secretary's interim regulation is more generous to claimants in certain ways. Specifically, unlike HEW's interim regulation, the Secretary's interim regulation provides that, in addition to X-rays and ventilatory studies satisfying medical criteria identical to those found in HEW's interim regulation, the presumption of total disability could be established by blood-gas studies, other medical evidence including a physician's opinion, and, in the case of a deceased miner and in the absence of relevant medical evidence, by the affidavit of a survivor. 20 C.F.R. 727.203(a)(3)-(5). At the same time, however, the Secretary's interim regulation allowed the presumption of total disability based on X-ray, biopsy, or autopsy evi-

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[6] Final regulations (20 C.F.R. Pt. 718) were proposed in 1978 and became effective on April 1, 1980.

dence of pneumoconiosis to be established only if a claimant worked in coal mines for at least ten years. 20 C.F.R. 727.203(a)(1). Thus, a claimant could not, as under HEW's interim regulation, gain the benefit of the presumption of total disability if he worked in coal mines for less than ten years by relying on other evidence to show causation. In that event, he could not trigger the presumption at all.[7]

2. *Proceedings below.* The claimant, Fred Kyle, worked in coal mines for eight and a half years between 1937 and 1951 (App., *infra*, 2a). He applied for black lung benefits in 1980 (*ibid.*); his claim was filed before the effective date of the Department of Labor's permanent regulations, so the statutory prohibition against the application of more restrictive "criteria" applied. 20 C.F.R. 718.1(b). Because the claimant had less than ten years of coal mine employment, he did not qualify for the presumption of total disability under the Secretary's interim regulation, although he produced an X-ray showing simple pneumoconiosis (App., *infra*, 4a). Relying in part on the claimant's post-1951 work and smoking histories, the ALJ denied benefits because the claimant had not proved that he is totally disabled from pneumoconiosis or a chronic lung disease arising out of his coal mine employment (*id.* at 19a). The Benefits Review Board affirmed (*id.* at 10a-14a).

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[7] The Secretary's interim regulation authorized the same two methods of rebutting the presumption of total disability as did HEW's interim regulation, *i.e.*, evidence showing that a miner is performing or could perform his usual coal mine work or comparable and gainful work. 20 C.F.R. 727.203(b)(1) and (2). The Secretary's interim regulation also expressly provided, however, that the presumption would be rebutted if the evidence established that the claimant's total disability did not arise from coal mine employment or that the miner did not have pneumoconiosis. 20 C.F.R. 727.203(b)(3) and (4).

A divided court of appeals reversed (App., *infra*, 1a-9a). The court held that the prohibition in Section 402(f)(2) against the application of more restrictive criteria required consideration of the claim under HEW's interim regulation (App., *infra*, 9a). The court recognized (*id.* at 5a) that "[m]anifestly, the term 'criteria' is subject to numerous possible interpretations," but, relying on *Halon* v. *Director, Office of Workers' Compensation Programs*, 713 F.2d 21 (3d Cir. 1983), and *Coughlan* v. *Director, Office of Workers' Compensation Programs*, 757 F.2d 966 (8th Cir. 1985), refused to defer to the Department of Labor's interpretation of the term to mean "medical criteria." Judge Guy dissented. He agreed with the Director that the statutory restriction refers only to medical criteria and adopted the reasoning of Judge Weis's dissent in *Halon*, finding it "a thorough analysis of the purpose and legislative history of the statutory language in question [that is] more persuasive than that of the majority here" (App., *infra*, 9a).

REASONS FOR GRANTING THE PETITION

The question presented in this case is identical to the question presented in *Broyles* v. *Director, Office of Workers' Compensation Programs*, 824 F.2d 327 (4th Cir. 1987). In *Broyles*, as in this case, the court of appeals held that Section 402(f)(2) requires application of HEW's interim presumption when a claimant with less than ten years' coal mine experience establishes that he suffers from pneumoconiosis by X-ray evidence and also shows that the disease arose out of coal mine employment.[8] The decisions

[8] It is not clear from the decision below whether the Sixth Circuit's reasoning is likely to lead to the conclusion that the Secretary's interim regulation is contrary to Section 402(f)(2) on the additional ground that it authorizes methods of rebuttal in addition to those listed in HEW's interim regulation. The court stated that "under certain

of these courts, and of the Third Circuit in *Halon* and the Eighth Circuit in *Coughlan*, conflict with the Seventh Circuit's decision in *Strike* v. *Director, Office of Workers' Compensation Programs*, 817 F.2d 395 (1987). In addition, as discussed in our petition for a writ of certiorari (at 10-12) in *Whitfield* v. *Sebben*, No. 87-827, the conclusion that the Secretary's regulation is inconsistent with the statute may require the reopening of as many as 94,000 claims.[9] Because of the conflict in the courts of appeals and the severe practical problems resulting from the decisions holding the Secretary's interim regulation inconsistent with the statute, review of the issue by this Court is warranted. The reasons why we believe the Seventh Circuit correctly concluded in *Strike* that the regulation is consistent with the statute and the other courts of appeals have erred will be set forth in more detail in our petition in *Broyles*. We suggest that the Court hold this petition and dispose of it in light of the Court's disposition of *Broyles*.[10]

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limited circumstances, the specific evidence necessary to rebut those presumptions may be altered over time" (App., *infra*, 8a), suggesting that the regulation is not inconsistent with the statute insofar as it authorizes additional rebuttal methods. See also *Prater* v. *Hite Preparation Co.*, 829 F.2d 1363, 1366 n.2 (6th Cir. 1987) (emphasis in original) ("Part B cases are not applicable to Part C claims with respect to *rebuttal* of the interim presumption * * *."); *Ramey* v. *Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 490 (6th Cir. 1985). The question whether the Secretary's interim regulation is inconsistent with the statute because it authorizes additional rebuttal methods, is pending in the Eighth Circuit in *Smith* v. *Consolidation Coal Co.*, No. 86-2397 (8th Cir. argued Oct. 16, 1987).

[9] We are serving a copy of our petition in *Sebben* on the other parties in this case.

[10] We will serve a copy of our petition in *Broyles*, which is due December 29, 1987, on the other parties in this case as soon as it is printed.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of *Director, Office of Workers' Compensation Programs* v. *Broyles*.

Respectfully submitted.

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DECEMBER 1987

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 85-3535

FRED KYLE, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, RESPONDENTS

Argued October 2, 1986

Decided May 18, 1987

Before: MERRITT, GUY and NORRIS, Circuit Judges.

Alan E. NORRIS, Circuit Judge.

Fred Kyle seeks review of an order of the Benefits Review Board of the United States Department of Labor which affirmed the decision of the Administrative Law Judge to deny him benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.*

In essence, Kyle's appeal is grounded on two contentions – first, that the A.L.J. erred by failing to consider his entitlement to an "interim presumption" of disability under 20 C.F.R. § 410.490 in connection with his claim for benefits, and second, that when that "interim presumption" is utilized he is entitled to black lung benefits as a matter of law. In addition, Kyle disputes some of the factual findings of the A.L.J., but, as our review of the record leads us to conclude that these findings are supported by substantial evidence, they may not be set aside

on appeal. *Moore* v. *Califano*, 633 F.2d 727, 729 (6th Cir. 1980). However, because we agree with Kyle's first contention, we reverse the Board's decision and remand for further proceedings.

On February 15, 1980, petitioner Kyle filed his claim for benefits. This claim was subsequently denied and Kyle requested a hearing. This hearing was held on May 25, 1982, and the A.L.J. made the following findings of fact: that Kyle was a coal miner for approximately eight and one-half years, ending in 1951; that he had pneumoconiosis which was depicted by X-ray; that blood gas and pulmonary function studies were within normal limits; that S.M. Hessl, M.D., examined Kyle in May 1980 and diagnosed chronic bronchitis and coal miner's pneumoconiosis arising out of his coal mine employment; that Dr. Hessl also found Kyle had an AMA Class III respiratory impairment, arteriosclerotic heart disease and right bundle branch block; and that Kyle's file was referred to a medical consultant, who concluded that he was not totally disabled from pneumoconiosis and that any respiratory disability that he had was the result of smoking. The A.L.J. determined that Kyle had not met his burden on proving that he was totally disabled from pneumoconiosis, and that he was therefore not entitled to black lung benefits.

In order to be eligible for benefits under the Act, a miner must demonstrate that he is totally disabled due to pneumoconiosis. 30 U.S.C. §§ 901(a), 902(b). To aid claimants in meeting this burden, the agencies which have administered the benefits program have provided a number of presumptions. The presumption at issue here is the one found in 20 C.F.R. § 410.490, which states, in part:

> (b) *Interim presumption.* With respect to a miner who files a claim for benefits before July 1,

1973 . . . such miner will be presumed to be totally disabled due to pneumoconiosis . . . if:

(1) One of the following medical requirements is met:

(i) A chest roentgenogram (X-ray) . . . establishes the existence of pneumoconiosis . . .

. . . .

(2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment. . . .

. . . .

(c) *Rebuttal of presumption.* The presumption in paragraph (b) of this section may be rebutted if:

(1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work. . . .

Because Kyle's claim was filed long after July 1, 1973, it would seem that he would not be able to claim the benefit of this presumption. However, Kyle contends that he is entitled to the presumption in view of a 1977 amendment to the Black Lung Benefits Act:

(f)(1) The term "total disability" has the meaning given it by regulations of . . . the Secretary of Labor . . . except that—

. . . .

(2) Criteria applied by the Secretary of Labor in the case of—

. . . .

(C) any claim filed on or before the effective date [March 31, 1980] of regulations promulgated under this subsection by the Secretary of Labor;

shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

30 U.S.C. § 902(f)(2) (emphasis added).

Kyle argues that the effect of the "shall not be more restrictive" language of this amendment is to require that his case be decided in light of legal criteria in place on June 30, 1973, and that includes 20 C.F.R. § 410.490. Because the A.L.J. found that an X-ray established the existence of pneumoconiosis, and Dr. Hessl concluded that Kyle's pneumoconiosis arose out of coal mining, it is apparent that, had the A.L.J. considered Kyle's claim in the light of Section 410.490 and also concluded that Dr. Hessl's report established causation, then Kyle would have been entitled to the presumption of total disability due to pneumoconiosis.

However, the Department of Labor contends that Kyle failed to raise this issue at any stage of the proceedings below, and he is therefore precluded from raising it before this court for the first time.

While an appellate court generally will not address an issue which was not presented below, an exception is made when raising the issue would have been futile. *See, e.g., Youakim v. Miller,* 425 U.S. 231, 235, 96 S.Ct. 1399, 1402, 47 L.Ed.2d 701 (1976); *Penland v. Warren County Jail,* 759 F.2d 524, 531 n. 6 (6th Cir.1985). At the time of the A.L.J.'s decision, the Board had rejected the application of Section 410.490 sought by Kyle. *See Lynn v. Director, Office of Workers' Compensation Programs,* 3 BLR 1-125, 126 (1981). The Board has also consistently held that it will not allow an A.L.J. to consider 20 C.F.R. § 410.490 in connection with claims filed after July 1, 1973, unless that consideration is required by the court of appeals of that particular circuit. *See, e.g., Kimmel v. Diamond Coal Co.,* 6 BLR 1-288, 291-93 (1983). In *Kimmel,* which was decided almost two years before the Board's decision in this case, the Board held that it would not apply Section 410.490 to claims arising in the Sixth Circuit which were filed after July 1, 1973. Accordingly, it would have been futile for Kyle to raise the argument.

The department next argues that, because Kyle's claim was not filed before July 1, 1973, the language of Section 410.490 itself precludes his reliance upon its presumption. It disputes Kyle's contention that the "shall not be more restrictive" language of the 1977 amendment to 30 U.S.C. § 902(f)(2) revives the application of the Section 410.490 presumption to him, since the department contends that the language refers not to evidentiary or adjudicatory criteria such as length of service, but only to medical criteria. It further maintains that the congressional mandate was complied with in the promulgation of 20 C.F.R. § 727.203, which is the regulation governing entitlement to an interim presumption, in later filed claims like Kyle's. That regulation establishes medical standards similar to those in Section 410.490 but it also includes an additional requirement that the miner have ten years of coal mine employment before he can qualify for the presumption of total disability due to pneumoconiosis.

While courts often defer to an interpretation given a statute by an agency charged with its administration, *see, e.g., United States v. Riverside Bayview Homes,* 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985), this deference is tempered by the role of the courts as "the final authorities on issues of statutory construction . . . [who] 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' " *Federal Maritime Commission v. Seatrain Lines,* 411 U.S. 726, 745-46, 93 S.Ct. 1733, 1784-85, 36 L.Ed.2d 620 (1973) (citations omitted). Manifestly, the term "criteria" is subject to numerous possible interpretations. Accordingly, we need to examine its utilization by the Congress, in the context of other statutory language, and of the history and purpose of the Black Lung Benefits Act, in order to determine whether it should be assigned the narrow meaning urged by the department. *See Local 705, International*

Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 565-66, 99 S.Ct. 790, 799-800, 58 L.Ed.2d 808 (1979); *Southeastern Community College v. Davis*, 422 U.S. 397, 411, 99 S.Ct. 2361, 2369, 60 L.Ed.2d 980 (1979).

An examination of legislative history reveals that adopting such a narrow meaning of the term "criteria" would be inconsistent with the purpose of the Act as articulated by several congressional sources. The general purpose of both the 1972 and 1978 amendments to the Act appears to have been to liberalize the standards under which black lung benefits were being awarded at the time. *See* S.Rep. No. 743, 92d Cong.2d Sess. 17, *reprinted in* 1972 U.S. Code Cong. & Ad.News 2305, 2320-21; H.R.Rep. No. 151, 95th Cong.2d Sess. 4, *reprinted in* 1978 U.S. Code Cong. & Ad. News 237, 240. The Third Circuit, in *Echo v. Director, Office of Workers' Compensation Programs*, 744 F.2d 327, 330 (3d Cir. 1984), exhaustively reviewed congressional purpose in regards to the Act and concluded that:

> The legislative history of the Black Lung Program demonstrates a clear pattern. Congress passed a statute intended to provide wide-spread benefits to miners disabled by black lung disease. The benefits, while never very high, were intended to be liberally awarded. Administrative practice, however, did not comport with legislative intent, and twice Congress was impelled to specify its intentions more clearly, "in order to insure as broad coverage as possible." (Citation and footnote omitted.)

Examination of the langugage of the statute also leads us to reject the department's interpretation of the term "criteria." The department insists that its reading of the term is correct because a sentence found in the subsection immediately preceding 30 U.S.C. § 902(f)(2) states that "the Secretary of Labor . . . shall establish *criteria for all appropriate medical tests* under this subsection which accurately reflect total disability in coal miners" [30 U.S.C. §

902(f)(1)(D) (emphasis added)], and the use of the word "criteria" in the following subsection must be parallel to its previous use. To further buttress this contention, the department cites the opinion in *Peabody Coal Co. v. Director, Office of Workers' Compensation Programs*, 778 F.2d 358, 362 (7th Cir.1985).

We find that argument less than convincing, since use of the word "criteria" in the previous subsection was specifically limited to the context of "medical tests," while omission of that restrictive terminology in the subsequent subsection only serves to indicate a general usage of the word "criteria" was intended, unencumbered by the limiting terminology. Obviously, Congress did not qualify its use of the term "criteria" in one subsection, but did in another. Since Congress is presumed to act intentionally when it includes particular language in one provision of a statute, but omits that language from another provision, we concluded that "criteria" should be accorded the broader meaning. *See, e.g., Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 300, 78 L.Ed.2d 17 (1983).

Our view of the statute is not necessarily in conflict with *Peabody Coal*, since the reference to "medical criteria" in that opinion may be viewed as *dictum* since it was not necessary to the court's holding that the Secretary of Labor did not exceed his authority in promulgating the Section 727.203(a) interim presumption.

We also note that the department's argument, that its position is supported by the legislative history of 30 U.S.C. § 902(f)(2), was made and rejected in *Halon v. Director, Office of Workers' Compensation Programs*, 713 F.2d 21 (3d Cir.1983), and *Coughlan v. Director, Office of Workers' Compensation Programs*, 757 F.2d 966, 968 (8th Cir.1985). On this point, the *Halon* court held that:

> The plain language of the statute does not suggest that Congress intended any such modification of the

> generic term "criteria." The legislative history is, at best, equivocal. References in debate to medical criteria are not dispositive. . . . The occasional specific mention of medical criteria does not support an inference that non-medical criteria were to be excluded. Other remarks in the debate suggest that the criteria referred to include adjudicatory standards as well as medical standards.

Id. at 24. (Citation omitted.)

Our review of the legislative history leads us to the same conclusion. Accordingly, we see no reason to place ourselves at odds with the position already taken by the Third and Eighth Circuits on the issues raised by this appeal.

Nor does that conclusion conflict with our opinion in *Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485 (6th Cir.1985), as suggested by the department.

In *Ramey*, this court was concerned with what specific evidence was required to rebut a presumption of pneumoconiosis under regulations promulgated pursuant to Part C of the Black Lung Act. *See* 20 C.F.R. § 727.203(a). Specifically, *Ramey* held that, even though vocational and medical evidence had been required to rebut the Part B presumption, the Secretary's presentation of medical evidence alone would be sufficient to rebut the Part C presumption. The court reasoned that such a holding was not inconsistent with the no "more restrictive" language because the exact evidence necessary to rebut the presumption was not permanently fixed by the language in 30 U.S.C. § 902(f)(2), which establishes the no "more restrictive" standard.

Ramey should not be read to suggest that the Part B presumptions no longer apply. On the contrary, *Ramey* should be interpreted to hold that, although the Part B presumptions are preserved, under certain limited circumstances, the specific evidence necessary to rebut those presumptions may be altered over time.

In the case before us, the question is whether the Part B criteria to invoke the presumption of disability are applicable. *Ramey* is not controlling in this context. Since the issue is one of criteria, as opposed to mere evidence, 30 U.S.C. § 902(f)(2) mandates that we apply the criteria set forth in Part B of the regulations. Accordingly, we must remand for a determination of whether the claimant can meet the Part B criteria.

The Board's decision is reversed and this cause is remanded in order that Kyle's claim to the benefit of an interim presumption may be considered in the context of 20 C.F.R. § 410.490.

RALPH B. GUY, Jr., Circuit Judge, concurring in part and dissenting in part.

I agree with the majority that the issue of Kyle's entitlement to an "interim presumption" of disability under 20 C.F.R. § 410.490 is properly before us, but respectfully disagree with their resolution of this issue.

I would read the statute as the Secretary suggests, as requiring that no less restrictive *medical* criteria be incorporated into the regulations. In support of my conclusions, I would offer the reasoning of the dissent in *Halon v. Director, Office of Workers' Compensation Programs,* 713 F.2d 21 (3rd Cir.1983). In *Halon*, Judge Weis made a thorough analysis of the purpose and legislative history of the statutory language in question, and I find this analysis more persuasive than that of the majority here.

APPENDIX B

UNITED STATES DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD

BRB No. 82-1968 BLA
OWCP No. 405-03-3687

FRED KYLE, CLAIMANT-PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

[Filed May 17, 1985]

DECISION AND ORDER

Appeal of the Decision and Order of Arthur C. White, Administrative Law Judge, United States Department of Labor.

Before: RAMSEY, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (81-BLA-4521) of Administrative Law Judge Arthur C. White denying benefits on a claim filed pursuant to the

provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). The administrative law judge found that claimant had established 8½ years of coal mine employment and, thus, considered claimant's entitlement pursuant to Subpart D of 20 C.F.R. Part 410. He determined that claimant has pneumoconiosis, but concluded that claimant had failed to establish that he is totally disabled from pneumoconiosis or a chronic lung disease which arose out of his coal mine work.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

An administrative law judge's finding of length of coal mine employment will be affirmed where it is based upon a reasonable method of computation and supported by substantial evidence in the record considered as a whole. *Hall v. Director, OWCP*, 2 BLR 1-998 (1980). The administrative law judge's finding that claimant's principal occupation from 1937 to 1951 was that of coal miner reflects that he did take claimant's testimony into consideration. The administrative law judge, however, may credit and rely upon Social Security records where claimant's memory is unreliable. *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984). Since claimant's testimony regarding his coal mine work did not fill in the gaps in the Social Security earnings record and reflects that he had a difficult time recalling the details of his coal mine employment, the administrative law judge properly relied upon the earnings record. We, therefore, affirm the administrative law

judge's finding of 8½ years of coal mine employment as it is based upon substantial evidence.[1]

In finding that claimant had not met the requirements of 20 C.F.R. Part 410, Subpart D, the administrative law judge considered the results of a physical examination performed by Dr. Strauss in January 1979 and medical reports of Dr. Stephen M. Hessl and Dr. Sarah B. Long. Claimant contends that the administrative law judge erred in finding claimant not totally disabled pursuant to Section 410.426(d) in light of the x-rays, medical reports, and lay evidence. Specifically, claimant contends that the administrative law judge erred in relying upon Dr. Long's opinion of no total disability because it is merely a recitation of claimant's medical history rather than a reasoned medical report. Dr. Long's opinion contains an evaluation of the objective data in the record, including the pulmonary function studies and blood gas studies, in addition to a recitation of claimant's symptoms. Her report states her professional opinion that claimant is not disabled by his pneumoconiosis based upon that data.

Claimant also argues that the administrative law judge erred in finding Dr. Long's report consistent with the positive x-ray of record and reports of examining physicians indicating the presence of chronic obstructive lung disease and pneumoconiosis. The positive x-ray and other medical reports finding lung disease and pneumoconiosis have no bearing upon the issue of Dr. Long's determination of no *disability* due to pneumoconiosis. *See Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983), *petition for review denied*, 738 F.2d 420 (3d Cir. 1984) (table).

---

[1] Claimant argues that, assuming ten years of coal mine employment, the sole x-ray of record, which was positive, would invoke the interim presumption pursuant to subsection (a)(1) of 20 C.F.R. §727.203. Since we affirm the administrative law judge's finding of 8½ years of coal mine employment, we need not address this contention.

In addition, there is no evidence of record which could support a finding that claimant is totally disabled pursuant to Section 410.426. The pulmonary function studies of record do not meet the criteria set forth in Section 410.426(b). Dr. Strauss did not evaluate the severity of claimant's impairment. Dr. Long explicitly stated that claimant is not totally disabled from pneumoconiosis and that any impairment he may have is due to smoking. Dr. Hessl's evaluation of claimant's disability as a "Class III respiratory impairment" amounts to only 25-35% impairment, which the administrative law judge chose not to interpret as establishing total disability. *American Medical Association Guides to the Evaluation of Permanent Impairment* at 75 (1977); *see Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). Claimant's lay testimony alone, absent corroborating medical evidence, is insufficient to establish total disability by a respiratory or pulmonary impairment pursuant to Part 410. *Centak v. Director, OWCP*, 6 BLR 1-1072 (1984). Accordingly, we affirm the administrative law judge's determination that claimant has not met his burden of proving that he is totally disabled from a chronic lung disease arising out of coal mine employment.[2]

---

[2] Claimant also argues that it was error for the administrative law judge to rely upon Dr. Long's report because she relied heavily on the documented five years of coal mine employment in determining that any disability claimant may have did not arise out of coal mine employment, but rather was caused by his smoking. Claimant also argues that Dr. Long's opinion regarding causation does not meet *Blevins* standards. *See Blevins v. Peabody Coal Co.*, 6 BLR 1-750 (1983). We need not address these contentions because the administrative law judge's denial of benefits was based primarily on his finding that claimant is not totally disabled. The discrepancy between five years and 8½ years of coal mine employment would not alter Dr. Long's conclusion of no total disability. *See O'Neal v. Director, OWCP*, 6 BLR 1-1132 (1984).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

/s/ ROBERT L. RAMSEY
Robert L. Ramsey, Chief
Administrative Appeals Judge

/s/ ROY P. SMITH
Roy P. Smith
Administrative Appeals Judge

/s/ NANCY S. DOLDER
Nancy S. Dolder
Administrative Appeals Judge

Dated this 17th day of May 1985

APPENDIX C

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

Case No. 81-BLA-4521

OWCP No. 405-03-3687

In the Matter of

FRED KYLE, CLAIMANT

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, PARTY IN INTEREST

[Issued Sept. 22, 1986]

Before: Arthur C. WHITE, Administrative Law Judge.

DECISION AND ORDER – REJECTION OF CLAIM

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* In accordance with the Act, and the regulations issued thereunder, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing.

Benefits under the Act are awardable to persons who are totally disabled within the meaning of the Act due to pneumoconiosis or to the survivors of persons who were so totally disabled at the time of their death or whose

death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

A formal hearing was held[1] in Chicago, Illinois, on May 25, 1982, at which all parties were afforded full opportunity to present evidence and argument, as provided in the Act and the regulations issued thereunder, found in Title 20 of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.

Findings of Fact and Conclusions of Law

Coal Miner

The claimant was a coal miner within the meaning of § 402(d) of the Act and § 725.202 of the regulations for approximately 8½ years ending in 1951. I find that Mr. Kyle's principal occupation from 1937 to 1951 was that of a coal miner except for the 3½ years he spent in military service. However, he had earnings from coal mine employment for only 34 quarters, so it can be seen that his coal mine work was rather sporadic. Even though he worked as a coal miner during 19 quarters between the second quarter of 1937 to the second quarter of 1942, and he did some coal mine work during approximately 17 quarters between 1946 and 1951, I am unable to credit him with more than 8½ years of coal mine work. I have given him credit for several quarters in which the Social Security records reflect less than one month of work, assuming he was paid the minimum wage rate then in effect. Mr. Kyle has the burden of establishing his period of coal mine work. See *Rennie v. United States Steel Corp.*, 1 BLR 1-859 (1978). He has established less than 10 full years of work in the mines.

---

[1] The transcript of hearing will be hereafter referred to as T.; other abbreviations will be as follows: Director's exhibits D.; and Claimant's exhibits, C.

Date of Filing

The claimant filed his claim for benefits under the Act on February 15, 1980. The claim is timely filed since no limitations in the Act on the time within which claims may be filed are applicable to claims filed on the date the claim was filed in this case.

Pneumoconiosis and Total Disability

Mr. Kyle underwent a chest x-ray in April 1980 (D. 12, 13) which was interpreted by J.J. Fitzpatrick, M.D., a board-certified radiologist, to show 1/o pneumoconiosis. In view of the opinion of the Benefits Review Board in the case of *Tobias v. Republic Steel Corp.*, 2 BLR 1-1277 (1981), I consider the opinion of Dr. Pitman (D. 13) only to the extent he found the x-ray film to be of acceptable quality. I, therefore, determine that Mr. Kyle has pneumoconiosis and that it has been depicited by x-ray § 410.414(a)) [*sic*].

As Mr. Kyle had less than 10 years of coal mine work and his claim was filed prior to the effective date of Part 718 of the regulation, his claim must be adjudicated under the provisions of Part 410.

Under the provisions of §410.424(a), a miner may be presumed to be totally disabled if blood gas studies reveal impairment of the transfer of oxygen from the lungs to the blood as set forth in the appendix of Part 410, or if cor pulmonale or congestive heart failure with the symptoms described in the appendix are manifest. As claimant's blood gas studies have been substantially within normal limits and as cor pulmonale or congestive heart failure has not been established, Mr. Kyle is not presumed to be totally disabled under §410.424(a).

The next criterion for considering the question of total disability, is set forth in §410.426. In this regard, pulmonary function studies with findings at or below the

levels set forth in subparagraph (b) would invoke the presumption of total disability. Initially, I conclude that claimant is 70" tall. It would be necessary for his pulmonary function studies to show an FEV_1 of 1.8 or lower and a MVV of 65 or lower for Mr. Kyle to be presumed to be totally disabled under this subsection. In March 1979, Mr. Kyle's FEV_1 was 3.1 and his MVV was 106. In April 1980, his FEV_1 was 2.5 and his MVV was 46.8. Hence, he may not be presumed to be totally disabled under §410.426(b).

Mr. Kyle could also be presumed to be totally disabled under §410.426(d). This regulation would be applicable if other relevant medical evidence established the existence of a chronic pulmonary disease which was of such severity that it precluded the claimant from accomplishing his previous coal mine work and also considering his age, his education and his work experience, prevented him from performing comparable and gainful work. It would also be necessary to show that the chronic pulmonary disease arose out of employment in the nation's coal mines. (§410.414(c)).

When claimant was examined in January 1979 (D. 6), tactile fremitus, percussion, resonance and vocal resonance were equal or normal bilaterally. There were no rales, rhonchi or wheezing. X-rays showed overaeration of the lungs, which apparently formed the basis for the diagnosis of chronic obstructive lung disease. S.M. Hessl, M.D., examined claimant in May 1980 (D. 15). The doctor diagnosed chronic bronchitis and coal workers' pneumoconiosis which he attributed to coal mine work. He concluded that claimant had an AMA Class III respiratory impairment. Diagnosis [*sic*] were also reported of arteriosclerotic heart disease and right bundle branch block.

Claimant's file was referred to a medical consultant (D. 17) who concluded that he was not totally disabled from

pneumoconiosis or [*sic*] a respiratory standpoint. The physician also concluded that the claimant's history of smoking was the primary cause of any respiratory disability he had.

Mr. Kyle has the burden of proving that his pneumoconiosis arose out of his coal mine work and that he is totally disabled because of the disease. (§410.414(b)). While Dr. Hessl states that Mr. Kyle has an AMA Class III respiratory impa[ir]ment which arose out of his coal mine work, the Department of Labor medical consultant concludes that claimant is not totally disabled from a respiratory standpoint and that any respiratory disability he has is unrelated to his coal mine work.

I am not bound by the theory or opinion of any given medical witness. *See Todd Shipyard Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). However, I do consider Dr. Long's opinion to be in keeping with the objective findings or lack thereof, which are normally considered to be indicative of a significantly disabling respiratory disease. Further, claimant's post-1951 work history as demonstrated by his Social Security records in addition to his smoking history could very well account for his chronic obstructive lung disease and the overaeration of his lungs. In any event, I conclude that Mr. Kyle has not met his burden of proving that he is totally disabled from pneumoconiosis or a chronic lung disease which arose out of his coal mine work.

Entitlement

The claimant is not entitled to black lung benefits.

Attorney's Fee

The award of an attorney's fee under the Act is permitted only in cases in which the claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case the Act prohibits the charging of any

fee to the claimant for representation services rendered to him in pursuit of his claim.

ORDER

The claim of Fred Kyle for benefits under the Act is denied.

/s/ ARTHUR C. WHITE
Arthur C. White
Administrative Law Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-3535

FRED KYLE, PETITIONER

v.

UNITED STATES DEPARTMENT OF LABOR, ET AL.,
RESPONDENTS

[Filed Sept. 22, 1987]

ORDER

Before MERRITT, GUY and NORRIS, Circuit Judges.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petitions for rehearing have been referred to the original hearing panel.

[T]he panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE
COURT

/s/ JOHN P. HEHMAN
John P. Hehman, Clerk

U.S. GOVERNMENT PRINTING OFFICE: 1987—202 037/60173

ORIGINAL

Nos. 87-1045 and 87-1065

RECEIVED
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

Supreme Court, U.S.
FILED
MAR 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

- v. -

FRED KYLE,

Respondent,

NATIONAL COUNCIL ON COMPENSATION INSURANCE,

Petitioner,

- v. -

FRED KYLE and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

RESPONDENT FRED KYLE'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent Fred Kyle, pursuant to Sup. Ct. R. 46.1, and for the reasons stated in the attached affidavit, moves for leave to proceed in forma pauperis before this Court. Respondent did not seek leave to proceed in forma pauperis before the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

Robert E. Lehrer

Robert E. Lehrer
One of the Attorneys for
Respondent Fred Kyle

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Nos. 87-1045 and 87-1065

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

- v. -

FRED KYLE,

Respondent,

NATIONAL COUNCIL ON COMPENSATION INSURANCE,

Petitioner,

- v. -

FRED KYLE and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED AS RESPONDENT IN FORMA PAUPERIS

I, FRED KYLE, being first duly sworn, depose and say that I am a respondent in the above-entitled case; that in support of my motion to proceed here without being required to prepay fees, costs or giving security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to peetitioners' Petitions for Writs of Certiorari are true.

1. Are you presently employed? NO

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

February 1976: monthly wages were approximately $610.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? **YES**

a. If the answer is yes, describe each source of income, and state and amount received from each during the past twelve months.

$414/month in social security benefits; $132 a month in disability benefits from Veteran's Administration.

3. Do you own any cash or checking or savings account? **NO**

a. If the answer is yes, state the total value of the item owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other values property (excluding ordinary household furnishings and clothing)? **YES**

a. If the answer is yes, describe the property and state its approximate value.

My wife and I own the home we live in in Chicago, Illinois. The assessed value of the home is $17,500, and the estimated market value is approximately $40,000. However, the home is mortgaged with a mortgage through the Veteran's Administration; and we pay $187 monthly on the mortgage. The unexpired term of the mortgage is approximately 12 years.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

The following persons live with me and are dependent upon me for support: my wife; my three children, ages 18 years old and younger, and two small grandchildren.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

"OFFICIAL SEAL"
BENIYE CLAY
NOTARY PUBLIC, STATE OF ILLINOIS
My Commission Expires 6/19/91

x Fred Kyle

FRED KYLE

Subscribed and Sworn before me this 11th day of February 1988.

Nos. 87-1045 and 87-1065

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1987

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

- v. -

FRED KYLE,

Respondent,

NATIONAL COUNCIL ON COMPENSATION INSURANCE,

Petitioner,

- v. -

FRED KYLE and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT FRED KYLE IN OPPOSITION

JEFFREY B. GILBERT
JULIAN N. HENRIQUES, JR.
ROBERT E. LEHRER*
LEGAL ASSISTANCE FOUNDATION
OF CHICAGO
343 South Dearborn Street
Suite 700
Chicago, Illinois 60604

Counsel for Respondent Fred Kyle

*Counsel of Record

PARTIES TO THE PROCEEDINGS

The parties to these proceedings are:

1. The Director, Office of Workers' Compensation Programs, United States Department of Labor, who is a petitioner in No. 87-1045, and a respondent in No. 87-1065.

2. Fred Kyle, who is a respondent in both No.87-1045 and in No.87-1065.

3. The National Council on Compensation Insurance ("NCCI"), who intervened in the court of appeals in proceedings to rehear the panel decision. NCCI is a petitioner in No. 87-1065.

TABLE OF CONTENTS

	Page(s)
TABLE OF AUTHORITIES	iii
ARGUMENT	3
CONCLUSION	7

TABLE OF AUTHORITIES

CASES: Page(s)

Adickes v. Kress & Co., 398 U.S. 144 (1970)..... 6

Broyles v. Director, Office of workers Compensation Programs, 829 F. 2d 327 (4th Cir. 1987), pet. for cert. filed 56 U.S.L.W. L.W. 3489 (U.S. Dec. 29, 1987) (No. 87-1095) . 1

Delta Airlines v. August, 450 U.S. 346 (1981) ... 6

Keney v. New York, 388 U.S. 440 (1967) 3

The Monrosa v. Carbon Black Export, Inc. 359 U.S. 180 (1959) 5

Sebben v. Brock, 815 F. 2d 475 (8th Cir. 1987) pet. for cert. granted 56 U.S.L.W. 3568 (February 22, 1988) (Nos. 87-821 and 87-827) 6

Stone v. Powell, 428 U.S. 465 (1976) 6

STATUTES:

26 U.S.C. § 4121(a) 5

26 U.S.C. § 9501 5

26 U.S.C. § 9501(d) 5

30 U.S.C. § 932 5

30 U.S.C. § 902(f)(2) 2

30 U.S.C. § 934 5

RULES AND REGULATIONS:

20 C.F.R. § 410.490 2

SUP. CT. R. 38.4 4

OTHER AUTHORITIES:

R. Stern, E. Gressman, S. Shapiro, SUPREME COURT PRACTICE (6th ed. 1986) 4

Nos. 87-1045 and 87-1065

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1987

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

- v. -

FRED KYLE,

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NATIONAL COUNCIL ON COMPENSATION INSURANCE,

Petitioner,

- v. -

FRED KYLE and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

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APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT FRED KYLE IN OPPOSITION

In No. 87-1045, the Director, while seeking a writ of certiorari to review the court of appeals' decision, does not seek plenary review of that ruling. He asks instead that his petition be held and disposed of as appropriate, in light of the disposition of Broyles v. Director, Office of Workers' Compesnation, 824 F. 2d 327 (4th Cir. 1987), pet. for cert. filed, 56 U.S.L.W. 3484 (U.S. December 29, 1987) (No. 87-1095) ("Broyles"). In No. 87-1065, NCCI does seek plenary review of the court of appeals' ruling, though three of the four questions it presents were not considered, much less resolved, by the panel. Respondent Fred Kyle accepts the Director's (but not NCII's) Statement. See Director's Pet. at 2-8.

The question of which the Director seeks review in No. 87-

1045 is identical to the one of which he seeks review in Broyles. Compare Director's Pet. at (I) with Director's Pet. at (I) in Broyles . (Both presenting question of whether Section 402 (f)(2) of Black Lung Benefits Act, 30 U.S.C. § 902(f)(2), obliges the Director to aply the interim presumption in 20 C.F.R. § 410.490 to certain black lung claimants with less than 10 yers of demonstrated coal mine work.) Moreoever, this same question (the "Section 402(f)(2) question"), is incorporated, in substance, by one of the questions already accepted for review in Sebben v. Brock, 815 F. 2d 475 (8th Cir. 1987), pet. for cert. granted, 56 U.S.L.W. 3568 (February 22, 1988) (Nos. 87-821 & 87-827) ("Sebben"), albeit on the petition of the Pittston Coal Group et al ("Pittston"), rather than the Secretary of Labor (the "Secretary") or the Director [1]. See Brief of Respondents in Opposition ("Op. Cert. Br.") in Broyles at 4-5. (Explaining the overlap). Therefore, respondent submits that the petitions the Director (in No. 87-1045) and NCII (in 87-1065) have filed should both be held and disposed of in light of this Court's decision in Sebben, or, if the Court grants the Director's pending petition for certiorari in Broyles, in light of its ruling in that case as well. [2]

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[1]. There were two petitions filed in Sebben. In No. 87-821, Pittston filed a petition raising four questions, one of which, as noted in the text, incorporated the Section 402(f)(2) question the Director presents here. In No. 87-827, the Secretary of Labor presented only a single question, one relating to the appropriateness of the mandamus relief the court of appeals in Sebben ordered for the black lung claimants there. Plainly, the Secretary did not regard the Section 402(f)(2) question as one properly presented for plenary review by Sebben, where, among other factors apparently obliging that conclusion, the court of appeals never considered the issue.

[2] Respondent here joins the Broyles respondents in urging this Court to grant certiorari in Broyles without further delay, to review the substantive Section 402(f)(2) question in that case. See Op. Cert. Br. in Broyles.

ARGUMENT

A. The Director submitted his petitions here and in Broyles after the Secretary submitted her petition in Sebben, but before this Court's February 22, 1988 order granting review in Sebben. The Solicitor General's position in the three petitions was that this Court should grant plenary review only of the court of appeals' decision in Broyles. Director's Pet. at 8-9; Secretary's Pet. in Sebben at 16-18. He therefore urged that the petition here "be held and disposed of as appropriate in light of...Broyles." Director's Pet. at 9. Similarly, he urged in his Sebben petition that the Secretary's petition there be held pending disposition of this case, since the remedial questions properly presented in Sebben would not have to be addressed at all, if the Section 402(f)(2) question in Broyles were resolved favorably to the Secretary in Broyles. Secretary's Pet. in Sebben at 16-18.

We agree with the Solicitor General that, as this case and Broyles present an identical issue, they should be disposed of together, and alike. This Court's decision to consider the Section 402(f)(2) question in Sebben, however, obviously diminishes the liklihood that it will review this question in Broyles, as the Solicitor General recommended. Put differently, it now appears as if the Broyles petition may be held for disposition in light of the ruling in Sebben, in accordance with the Court's usual practice when a pending petition for certiorari presents a question accepted for review in another case, see e.g., Keney v. New York, 388 U.S. 490 (1967). Whether the Court chooses to so hold Broyles, or grants certiorari in that case, as respondents there urge in their Op. Cert. Brief, the petition here should be held, and disposed of as appropriate in light of this Court's resolution of the Section 402(f)(2) question in Sebben and/or Broyles.

B. NCCI's petition in No. 87-1065 should also be held and disposed of in light of the Court's rulings in Sebben, and, if certiorari is granted in Broyles, in light of its decision in that case as well. Plenary review is completely unwarranted.

1. NCCI was not even a party to this litigation until after the court of appeals' decision here. It is able to style itself a petitioner only because the court of appeals granted its "Motion for Leave to Intervene and to File a Petition for Rehearing" which it filed in that court on June 24, 1987, five weeks after the panel's ruling. Whether the order allowing intervention was correct is very questionable, on a number of grounds. Even an assumption that the order was correct, however, does not obscure the fact that NCCI'S involvement with this litigation came late and was then limited, following as it did the very ruling it now seeks to overturn. A "party" whose procedural involvement in litigation is so attenuated should be permitted to secure plenary review by this Court only upon a showing that a principal party--here the Director--will not adequately represent its interests, See generally, R. Stern, G.Gressman, S. Shapiro, SUPREME COURT PRACTICE (6th ed. 1986), § 14.5. Cf., SUP CT. 38.4 (Providing that court will ordinarily hear oral argument from only one counsel on each side; divided argument not favored.) But with respect to the Section 402(f)(2) question, which is the only question that the court of appeals' ruling here properly presents, NCCI makes no such showing. See §B.3, infra.

2. NCCI's attenuated procedural involvement in this litigation, see ¶ B.1, supra, is matched by its attenuated substantive interest. NCCI describes itself as a "nonprofit, voluntary association of insurance companies, insuring and reinsuring workmen's compensation policies." NCCI Pet. at ii.

But insurance companies are never parties to administrative proceedings on any claims for black lung benefits. See, 30 U.S.C. §§ 932,934; 26 U.S.C. §§ 4121(a), 9501. Either a coal operator, or the Secretary of Labor himself, by the Director, is the claimant's adversary. Id. Respondent's last coal mine employment, moreover, was before January 1, 1970, and thus there is no "responsible coal mine operator," for his claim (i.e. an operator who could be required to pay any benefits owed). Administrative Law Judge Decision at Director's Pet. pp 15a-16a. Accordingly, the Director was, and is, the lone opponent of Mr. Kyle's claim, and the party responsible for the payment of any benefits due Mr. Kyle, out of federal funds. 30 U.S.C. § 932; 26 U.S.C. § 9501(d). Thus, not even any coal operator that NCCI's member companies insure has an identifiable financial interest in the outcome of respondent's claim. Much less does NCCI. Even a party whose party "status" is unclouded should have to show a more substantial interest than that, to invoke the discretionary exercise of this Court's jurisdiction. See, The Monrosa v. Carbon Black Export, Inc. 359 U.S. 180, 183-84 (1959). Put differently, if plenary review is to be granted here, it should be at the behest of someone with a direct and substantial interest in the litigation. Here that someone is the Director, not NCCI.

3. In its petition, NCCI seeks review of four questions. NCCI Pet. at i. The first question is, in substance, the Section 402(f)(2) question that the court of appeals below addressed, but which this Court has now decided to review in Sebben. See § A. supra. In this context, however, NCCI can offer no presentable argument why the petitioners in Sebben (the Secretary of Labor and Pittston), or, if this Court decides to grant the petition in Broyles, the petitioner there (the Director) will not perfectly well represent whatever interest they have in the resolution of that question. Accordingly, there

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should be no occasion to grant NCCI's petition to allow it to also brief and argue this question to the Court. Its prospective resolution in Sebben, and possibly Broyles, makes it appropriate to hold the petition pending the decisions in one or both of those cases.

The three other questions of which NCCI seeks review reflect its attenuated involvement in this case. These three questions are all ones the court of appeals never decided, and the Director does not present in No. 87-1045. Indeed, none are questions any party even presented to the panel here, prior to its ruling. Moreover, we know of no appellate court that has ever squarely addressed, much less accepted, any of the ambitious contentions these questions carry with them. See NCCI Pet. at 14-17.[3]

This court does not ordinarily consider questions not specifically considered and passed upon by the lower court. Youakim v. Miller, 425 U.S. 231, 234 (1976), Adickes v. Kress & Co., 398 U.S. 144, 147 n. 2 (1970), Delta Airlines v. August, 450 U.S. 346,362 (1981) (question presented in petition but not to court of appeals will not be reviewed). Such a rule is to be disregarded only in exceptional cases. See, Stone v. Powell, 428 U.S. 465, 481 n. 15 (1976). NCCI does not explain why this is such a case. Plenary review of any of these questions is therefore unwarranted. At the same time, one of these three questions (Question Presented No. 2 at NCCI Pet. p. i) is similar to a second question taken for review in Sebben. Compare Question Presented No. 2 in No. 87-1065 with Question Presented No. 3 in No. 87-821 (Whether judicial application of 20 C.F.R. § 410. 490 to some black lung claims violates federal

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[3]. Under these circumstances, we see no reason to burden this Court by here addressing any of these contentions.

Admnistrative Procedure Act.). NCCI's petition is therefore appropriately held for resolution of this question in Sebben, for substantially the same reasons as it is appropriately held for resolution of the Section 402(f)(2) question in the same case, and possibly Broyles as well.

CONCLUSION

The petitions for writs of certiorari in Nos. 87-1045 and 87-1065 should both be held and disposed of as appropriate in light of the Court's decision in Sebben, and, if the Court grants the Director's pending petition for certiorari in Broyles, in light of its ruling in that case as well.

Respectfully submitted,

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